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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

v.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents and Joint Petitioners.

Brief of Santa Fe Pacific Railroad Company as Amicus Curiae

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In the Supreme Court of the United States

No. [illegible]

MATERIA CURIAE

In the Supreme Court of the United States

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COUNTY OF MOHAVE, a political subdivision of
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INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of Santa Fe Pacific Railroad Company with the consent of all the parties pursuant to Rule 42(2) of this Court. The consents are on file with the Clerk.

Santa Fe Pacific Railroad Company acquired some 41,711.22 acres of land by patent from the United States of America on November 5, 1910 pursuant to the Land Grant

Act of July 27, 1866. Thereafter, both prior and subsequent to the enactment of the Enabling Act which granted statehood to the State of Arizona, Santa Fe sold substantially all of the acreage and conveyed it by warranty deed to private owners, one of whom was petitioner's predecessor in title.

The decision of the Supreme Court of Arizona appears to hold that under the "equal footing" doctrine the Enabling Act may have vested in the State of Arizona title to lands already conveyed to Santa Fe Pacific prior to statehood. The potential exposure of Santa Fe Pacific upon its warranties could be substantial.

ARGUMENT

The sole question to which this brief is addressed is the effect of the Enabling Act granting statehood to Arizona on the title of a prior patentee from the United States of lands along the Colorado River. The question appears to be one of first impression and may involve serious due process implications.

While the record does not disclose the movement of the river between the meander survey of 1902-03 and the completion of Hoover Dam in the mid-1930's, the Arizona Court's definition of "high water mark" could very well place the limits of the navigable stream both in 1910 (the date of Santa Fe's patent) and in 1912 (Arizona's statehood) at points which would embrace all or part of the lands patented to Santa Fe.

The Court's Supplemental Opinion, 495 P.2d 1312, states:

> "The title to all lands within the beds of navigable waters including all reclaimed lands which formerly were beneath navigable waters up to the ordinary high water mark was quitclaimed in 1953 to the states by the Submerged Lands Act of Congress, 67 Stat. 29, 43 U.S.C.A. § 1301 et seq."

The Submerged Lands Act has never been regarded as creating new rights in the beds of navigable streams. The Act is merely confirmatory of rights previously created. See the extensive committee reports set out in 1953 U.S. Code Cong. & Adm. News, pp. 1385-1640.

The opinion continues:

> "Beyond argument, title to and ownership of the lands beneath the Colorado River is in the State of Arizona from the Nevada boundary up to the ordinary high water mark in the natural channel as it existed prior to the taming of the river in 1938 by the completion of the Hoover Dam and the subsequent lowering of the channel by dredging."

Unless this holding is carefully limited, it is susceptible of the interpretation that the State of Arizona owns all the lands over which the River may have flowed naturally from, at least, February 2, 1848, the date of the Treaty of Guadalupe Hidalgo, 9 U.S. Stat. 922, which established the boundary between the United States and Mexico.

What the Arizona court's pronouncement fails to recognize is that, whatever the extent of Arizona's ownership, it did not vest until the state was admitted to the Union. In 1910, when the federal Land Grant patent issued to Santa Fe, the United States owned the land. Title to Santa Fe's land could not thereafter be vested in another by the United States, whether by patent to a private citizen or by admission of Arizona into the Union.

In *Hughes v. State of Washington*, 389 U.S. 290 (1967) this Court had before it the issue whether state or federal law controlled the resolution of a dispute between the State of Washington and a private owner of ocean-front land over tideland accretions. The predecessor in title of the private owner acquired his land by conveyance from the United States prior to Washington's statehood. The Court said:

> "Prior to 1889 all land in what is now the State of Washington was owned by the United States *except land that had been conveyed to private parties.*" 389 U.S. at page 291 (Emphasis supplied)

Washington's Attorney General did not contend that the Enabling Act or the Submerged Lands Act vested in the State title to any part of the land previously conveyed by the United States to the private owner.

The sweeping language of *Bonelli* purports to be based upon this Court's early decisions in *Pollard v. Hagan*, 15 U.S. (3 How.) 391 (1845) and *Goodtitle v. Kibbe*, 18 U.S. (9 How.) 228 (1850). Both cases involved patents from the United States to private owners *after* Alabama was admitted to statehood. The evidence disclosed that the waters of the Mobile River had covered the disputed land at ordinary high water from time to time from statehood to a date prior to the patents to the private owners. Since title to the ordinary high water mark vested in Alabama at statehood the subsequent patents were held to be void.

There is no basis in reason to assume that the result in either of these cases would have been the same if the patents had issued *prior* to statehood. Indeed, Chief Justice Taney, in *Goodlittle*, said:

> "Undoubtedly, Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State. But this was not done." 18 U.S. at page 229.

And the digest of the holding in *Pollard*, prepared by Mr. Justice Curtis, is as follows:

> "The State of Alabama, when admitted to the Union, became entitled to the soil under the navigable waters within the limits of the State, *not previously granted.*" 15 U.S. at page 666 (Emphasis supplied)

To the extent that the Arizona Supreme Court's decision in *Bonelli* purports to confirm in the State of Arizona *as of statehood* title to submerged lands previously conveyed to Santa Fe it constitutes a taking without just compensation in violation of the Fourteenth Amendment.

CONCLUSION

We urge the Court to clarify the rights of patentees prior to statehood and to limit the interest of the State of Arizona in the bed of the Colorado to lands not previously patented to others.

Respectfully submitted,

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